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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of

DAVID A. RINGER

et al.

For Construction Permit
Channel 280A
Westerville, Ohio

) MM DOCKET NO. 93-107
)
) File No. BPH-911230MA
) through
) File No. BPH-911231MC
)
)
)

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To: The Review Board

OPPOSITION TO PETITION FOR LEAVE TO AMEND

Radio Stations WPAY/WPFB, Inc. is the licensee of radio station WPAY-FM, Portsmouth, Ohio. In a Petition for Leave to Amend, applicant David A. Ringer (BPH-911230MA) ("Ringer") has proposed a new transmitter site, short spaced according to Federal Communications Commission ("FCC") regulations with WPAY-FM. In essentially similar Petitions for Leave to Amend, Shellee F. David ("Davis") and ASF Broadcasting Corp. ("ASF") likewise proposed new transmitter sites short spaced to WPAY.

None of the three aforementioned applicants served WPAY or its counsel with the respective petitions for leave to amend.¹

The Ringer Petition relied upon §73.215 as justification for the proposed violation of rules requiring adequate spacing between

¹ An Opposition to the Davis and ASF Petitions was filed herein by WPAY-FM August 30, 1994. This identical Opposition is accordingly directed to Ringer. Notice of filing of none of the three petitions was received by WPAY-FM prior to August 25, 1994.

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his proposed new site and WPAY-FM. Operating on channel 281, WPAY-FM is but one channel removed from that proposed by Ringer.

Another applicant in the captioned proceeding, Ohio Radio Associates, Inc. ("ORA"), has proposed a fully spaced site and requires no waiver of applicable spacing rules. The spacing now proposed by Ringer is new and cannot be "grandfathered" under §73.213 of the rules.

Petitioner is seeking waiver of adequate spacing rules through use of directional antennas and pursuant to §73.215. In adopting that section, the Commission did not abandon the requirement that an applicant make a threshold showing that (1) no fully spaced site is available, (2) the site proposed is the least short spaced of all short-spaced sites, and (3) the public interest requires that applicant be permitted to use a short-spaced site.² None of these criteria has been met by Ringer. Indeed, he has advanced no public interest factors for consideration in support of his Petition.³

² Townsend Broadcasting Corp., 62 FCC 2d 511 (1976).

³ See, Report and Order in FM Broadcast Stations (Short-Spacing Using Contour Protection), 4 FCC Rod 1681, 65 RR 2d 1651, released February 22, 1989. Nowhere in that Report and Order did the Commission state that it was abandoning its long-standing requirement that an applicant proposing a short spacing need show that no non-short-spaced site is available. On the contrary, the Commission stated that the rule changes "will permit the installation of facilities that would not be possible due to the lack of available sites at fully spaced locations." (p. 1668 "Need and purpose of this action"). Obviously the Commission preferred use of a full signal from a fully spaced site to a directional proposal which reduced signal strength or a significant area that would receive service. Petitioner Ringer has presented no engineering data to compare service from a fully spaced site with that provided by the directional antenna proposed.

Both the Court and the Commission have recognized the need for a fully spaced site if available. North Texas Media, Inc. v. FCC, 778 F. 2d 28, 34 (D.C. Cir. 1985); Townsend Broadcasting Corp., 62 FCC 2d 511, 512, 38 RR 2d 880 (1976); Megamedia, 67 FCC 2d 1527, 1528, 42 RR 2d 208 (1978); On the Beach Broadcasting, 7 FCC Rcd 1346, 70 RR 2d 880 (Rev. Bd. 1992).

In On the Beach Broadcasting, *supra*, the Review Board (some three years after adoption of §73.215 in MM Docket 87-121) observed:


The Commission requires that an applicant seeking a waiver of a Commission Rule must make a compelling showing in support of its request. Stoner B/casting System, Inc., 49 FCC 2d 1011 (1974). As the court observed in WAIT Radio v. FCC, 418 F2d 1153, 1157 (DC Cir 1969), "An applicant for waiver faces a high hurdle even at the starting gate." Further, the Commission has placed particular emphasis on the importance of maintaining the integrity of its FM allocation plan, including strict adherence to the mileage separation requirements. The Commission will deviate from its mileage separate requirements, and grant waivers, only in the most compelling circumstances. Carroll-Harrison B/casting, Inc., 67 FCC 2d 254 (1977). When an applicant requests a waiver of the Commission's minimum spacing requirements, it must first make a threshold showing that suitable non-short-spaced sites are not available. Townsend B/casting Corp., 62 FCC 2d 511, 512 (1976). Second, the proposed short-spaced site must be found to be the least short-spaced site available. Megamedia, 67 FCC 2d 1527, 1528 (1978). Third, an applicant must demonstrate that the public interest benefits flowing from a grant of the waiver request would be sufficiently compelling to offset the magnitude of the spacing deficiency proposed. Townsend, *supra*, at 512; see also Edens B/casting Inc., 2 FCC Rcd 4327 (1991). . . .

Through its decisions, the Commission has established the policy that an applicant proposing a short-spaced site must meet the criteria recited hereinabove. In adopting §73.215 and its subsections, the Commission did not - specifically or by

implication - negate or modify that policy. Should the Board now consider espousal of a policy that would permit an applicant to select a short-spaced site when fully spaced sites are readily available, the concept of adequate spacing requirements will have been written out of Commission's rules. The Review Board is without authority to now do so.⁴

Respectfully submitted,

RADIO STATIONS WPAY/WPFB, INC.

By 
Julian P. Freret
Its Counsel

BOOTH, FRERET & INLAY
1233 20th Street, N. W.
Suite 204
Washington, D. C. 20036
(202) 296-9100

September 23, 1994

⁴ The Board cannot make new policy or change old policy. Charles County Broadcasting Co., Inc., 25 RR 903 (1963); Horne Industries, Inc., 53 RR 2d 1647 (1983).

CERTIFICATE OF SERVICE

I, Margaret A. Ford, Office Manager of the law firm of Booth, Freret & Inlay, do certify that copies of the foregoing OPPOSITION TO PETITION FOR LEAVE TO AMEND were mailed this 23rd day of September, 1994, via U. S. Mail, postage prepaid, first class, to the offices of the following:

Charles Dziedzic, Chief
Hearing Branch, Mass Media Bureau
Federal Communications Commission
2025 M Street, N. W., Room 7212
Washington, D. C. 20554

Arthur V. Belendiuk, Esquire
Smithwick & Belendiuk, P.C.
1990 M Street, N. W., Suite 510
Washington, D. C. 20036

James A. Koerner, Esquire
Baraff, Koerner, Olender & Hochberg, P. C.
5335 Wisconsin Avenue, N. W., Suite 300
Washington, D. C. 20015-2003

Eric S. Kravetz, Esquire
Brown, Nietert & Kaufman
1920 N Street, N. W., Suite 660
Washington, D. C. 20036

Dan J. Alpert, Esquire
1250 Connecticut Avenue, N.W.
7th Floor
Washington, D. C. 20036-2603

Stephen T. Yelverton, Esquire
McNair & Sanford, P.A.
1155 15th Street, N. W., Suite 400
Washington, D. C. 20005


Margaret A. Ford